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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

No. 2243.

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

On Petition for Review from the United States District Court for the District of Idaho, Northern Division.

REPLY BRIEF OF PETITIONER DUVAL JACKSON ON REVIEW.

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ARGUMENT.

In replying to the arguments and authorities put forth by the respondent, both in his brief and oral argument, a few facts as shown by the record would seem to conclusively settle the controversy.

The two written proposals made by the petitioner, Duval Jackson, to Samuel L. Boyd, trustee,

of the Lane Lumber Company, Limited, bankrupt, to purchase the remaining assets of said bankrupt company, were substantially alike (R. pp. 8 to 20).

The first proposal was for the mill, machinery and other personal property and certain real estate therein described situated in Kootenai County, Idaho.

The second proposal was for timber lands only (See R. pp. 15, 16, 17 and 18).

Each proposal was headed:

"PROPOSAL TO PURCHASE CERTAIN PROPERTY"

and was addressed "To Samuel L. Boyd, Trustee in Bankruptcy of Lane Lumber Company, Limited." After the address the proposals read as follows:

> "THE UNDERSIGNED PROPOSES TO PURCHASE OF YOU, SUBJECT TO THE CONFIRMATION AND APPROVAL OF THE ABOVE-ENTITLED COURT, ALL OF THE PROPERTY AND ASSETS OF THE LANE LUMBER COMPANY OF WHATSOEVER KIND, CHARACTER, OR DESCRIPTION, excepting only its timber lands and including all the property, save only said timber lands scheduled in the schedule and inventory annexed to your petition to sell real and personal property filed in the above-entitled court on the .... day of February, 1912, which said petition, with schedule and inventory attached, is now on file in said court and reference to which is hereby made; excepting only from said schedule and inventory the timber lands

above referred to and certain assets which have been sold, or otherwise disposed of by you, report of which are likewise now on file in the above-entitled cause.

THIS PROPOSAL INCLUDES ALL OF THE LUMBER OF SAID COMPANY SCHEDULED IN SAID SCHEDULE AS 3,186,631 FEET IN QUANTITY, ALL OF THE MOLDINGS SCHEDULED IN SAID SCHEDULE AND INVENTORY AS AMOUNTING TO 58.524 LINEAL FEET IN QUANTITY, ALL OF THE LATH IN SAID SCHEDULE SCHEDULED AS AMOUNTING TO 334,600 PIECES, ALL OF THE LOGS OF THE COMPANY SCHEDULED IN SAID SCHEDULE AS AMOUNTING TO 17,715 MIXED LOGS IN QUANTITY; all of the stable supplies, wagons, boat-houses, boat docks, rowboats, livestock, office furniture and fixtures, tools, mill supplies, realty and equipment, cooking utensils, furniture, tools, tugboat, barge, boom-stock and boom-chains.

ALSO INCLUDING THE FOLLOWING REAL ESTATE AND PROPERTY SITUATED IN KOOTENAI COUNTY, IDAHO: (Here follows a description of the lands) (R. pp. 8-9).

Further down in said proposition the following statement is made:

"FOR THIS PROPERTY THE UNDERSIGNED OFFERS YOU THE SUM OF $69,519.40, OF WHICH SUM I DEPOSIT WITH YOU AT THIS TIME THE SUM OF $1,000.00 AS EVIDENCE OF MY GOOD FAITH, TO BE RETURNED TO THE UNDERSIGNED IN CASE YOU FAIL TO

SECURE THE ACCEPTANCE AND CONFIRMATION BY THE COURT TO THIS PROPOSAL. THE FURTHER SUM OF $39,000.00 IS TO BE PAID BY THE UNDERSIGNED ON JULY 24, 1912, AND THE FURTHER SUM OF $29,519.40 IS TO BE PAID SEPTEMBER 24, 1912, AT WHICH TIME YOU ARE TO CONVEY TO ME ALL OF THE PROPERTY AFORESAID BY GOOD AND SUFFICIENT DEEDS AND INSTRUMENTS OF CONVEYANCE, AND DELIVER ACTUAL POSSESSION THEREOF TO THE UNDERSIGNED" (R. p. 12).

And at the end of the proposal the following appears:

"SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE" (R. p. 14, beginning 4th line).

Three days after the proposals were made, the trustee filed his petition before Lawrence L. Lewis, referee, in bankruptcy, and stated, after setting forth certain facts, the following:

"THAT YOUR PETITIONER HAS RECEIVED TWO BIDS ON AND FOR THE RESIDUE AND REMAINDER OF SAID

ESTATE BY DUVAL JACKSON, OF KANSAS CITY, MISSOURI, BIDDING THEREFOR THE SUM OF ONE HUNDRED FORTY THOUSAND ($140,000.00) DOLLARS, WHICH IS MORE THAN 75% OF THE APPRAISED VALUE OF SAID PROPERTY, AS DISCLOSED BY THE APPRAISERS' REPORT ON FILE; THAT SAID ORIGINAL PROPOSALS TO PURCHASE WERE FILED HEREIN ON JUNE 27, 1912; THAT FULL, TRUE AND CORRECT COPIES OF SAID PROPOSALS TO PURCHASE ARE HERETO ATTACHED MADE A PART HEREOF, MARKED EXHIBIT 'A' AND 'B'; EXHIBIT 'A' BEING THE PROPOSAL TO PURCHASE ALL OF THE REAL AND PERSONAL PROPERTY OF THE BANKRUPT, EXCEPT THE TIMBER LANDS; EXHIBIT 'B' BEING THE PROPOSAL TO PURCHASE THE TIMBER LANDS OF THE BANKRUPT, EXCLUDING ALL THE OTHER REAL AND PERSONAL PROPERTY" (R. pp. 22-23, beginning at last paragraph on page 22).

Latter in said petition, the trustee states:

"YOUR PETITIONER IS OF THE OPINION AND VERILY BELIEVES THAT A LARGER SUM THAN IS ABOVE BID CANNOT BE OBTAINED, AND ADVISES THAT THE SAID REAL AND PERSONAL PROPERTY BE SOLD AND DELIVERED TO THE BIDDER, FOR THE REASON THAT SAID SAWMILL, PLANING-MILL AND PERSONAL PROPERTY HAVE BEEN AND ARE RAPIDLY DETERIORATING IN VALUE," * * * (R. p. 23, beginning second paragraph).

Again later on said petitioner states:

> "THAT IN THE OPINION OF YOUR PETITIONER, SAID ESTATE IS UNLIKELY TO PRODUCE BETTER RESULTS AND HE VERILY BELIEVES THAT EACH OF THE PROPOSALS TO PURCHASE SHOULD BE ACCEPTED AND THE SALE CONFIRMED (R. pp. 23-24, beginning last paragraph on page 23).

On June 29, the referee caused a notice to be published to the creditors and other persons interested, of said proposals, which notice stated:

> "WHEREAS, TO-WIT, ON THE 27TH DAY OF JUNE, A. D. 1912, THE PETITION OF THE TRUSTEE OF SAID ESTATE FOR THE APPROVAL AND CONFIRMATION OF A PROPOSED SALE OF THE RESIDUE AND REMAINDER OF THE PROPERTY, BOTH REAL AND PERSONAL, ALL AND SINGULAR, OF THE ABOVE NAMED BANKRUPT, AS IS MORE FULLY SET FORTH AND DESCRIBED IN SAID PETITION, AND PROPOSED SALE BEING FOR SEVENTY-FIVE PER CENT (75%) OF THE APPRAISED VALUE OF SAID PROPERTY" (R. p. 25).

And said hearing was set for the 15th day of July, 1912 (R. p. 25).

On July 10, 1912, the petitioner withdrew his two proposals to purchase (R. p. 26).

NOW IN BOTH OF THE WRITTEN PROPOSALS, IN THE PETITION OF THE TRUS-

TEE AND IN THE NOTICE OF THE REFEREE TO THE CREDITORS the whole matter was considered and treated merely as proposals to purchase and not a sale and at no place in the entire proceeding up to the time of the withdrawal by Mr. Jackson of his proposals is there one word or intimation that a sale had been made, or that the offers made by Mr. Jackson had been accepted by the trustee, or any one else for that matter. In fact, the trustee did not accept the offers but simply passed the proposals up to the referee and creditors to be accepted or rejected by them, and it never at any time entered his mind to accept the offers. All of this is clearly shown by the transcript and are the facts in the matter.

Two days after Mr. Jackson withdrew his offers, the trustee, well knowing that he had never made any sale, or accepted Mr. Jackson's offers, sold twenty-one thousand dollars worth of lumber, lath. moulding and cedar logs included in the Jackson proposal, to A. W. Lammers. (Please note that the logs sold to Mr. Lammers were the cedar logs included in Mr. Jackson's bid and not the fir and Tamerack logs, mentioned in Jackson's proposal, that permission was given to sell to the Atlas Tie Co. R. p. 13.) Thus again showing conclusively that the trustee had never accepted Mr. Jackson's offer and knowing this fact accepted the offer of Mr. Lammers and sold the property to him.

And with the Lammers sale the right was given

for the USE OF THE PLANING MILL, POWER PLANT AND EQUIPMENT NECESSARY TO MACHINE AND LOAD SAID LUMBER, LATH AND MOULDING, INCLUDING THE USE OF ONE OR TWO TEAMS OF HORSES, IF NECESSARY, FREE OF ANY ADDITIONAL CHARGE (R. p. 34, 17th line).

By the transcript, the deal with Mr. Lammers is shown to be a sale, and therefore the trustee placed himself in such a position that the proposals made by Mr. Jackson could not be accepted or confirmed.

Still, in spite of the fact that the trustee had sold part of the property included in the Jackson proposal to another party, the referee, on the 15th day of July, 1912, attempted to CONFIRM A SALE to Jackson, and this is the first time that mention is made of a sale having been made (R. p. 31), as theretofore all the proceedings had been in regard to accepting and passing upon the proposals made, not upon any sale.

Of course, it cannot be contended that the attempted confirmation is of any validity.

As a proposal to become a binding contract must be accepted in the exact terms of the offer. This being the case Jackson is entitled to recover on the grounds that his offers were never accepted, either in the quantities, sums, or terms offered. There is no showing whatever that the trustee ever accepted or attempted to accept Mr. Jackson's offer and until this offer was accepted (if the trustee had

the right to make the sale), the same could be withdrawn at Mr. Jackson's pleasure, and when Mr. Jackson withdrew his offer on the 10th day of July, 1912, before any acceptance had been taken on his proposals, the matter stood the same as if the offers had never been made.

This proposition of law is so well settled that citations are hardly necessary, but in support of the same is the case of

Minneapolis and St. Louis Railway vs. Columbus Rolling Mill, 119 U. S. 149.

In this case Mr. Justice Gray says:

> "The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell impresses no obligation until it is accepted according to its terms. So long as the offer has neither been accepted or rejected, the negotiation remains open, and imposes no obligation on either party, the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had been made."

And all the decisions of the United States and the different states are in accord with the above law.

Therefore before the proposals made by Mr. Jackson could become binding contracts, there must be assent shown on the part of the trustee, and all the courts hold to this rule.

In the case of National Bank vs. Hall, 101 U. S.

50, the United States Supreme Court laid down the following rule:

> "Without assent a thing was wanting, which was indispensable to the continuity of the contract."

And in the case of Klienhans vs. Jones, 68 Fed. 742, the court, in passing upon the question of whether the minds of the parties met, held:

> "Then, recurring to the rules of law whereby such binding contract may be formed, it is an elementary doctrine that, to constitute a valid contract, the minds of the parties must have met, and agreed to the terms of their agreement. It is necessary, not only that the parties shall have assented to the several terms of the contract, but, in order that there shall be any bond which shall tie the parties in mutual obligations, their assent must be communicated to each other."

Parson on Contracts lays down the rule:

> "There is no contract unless the parties assent, and they must assent to the same thing, in the same sense.
>
> 1 Parsons Contracts, 475.

And this assent must be communicated to the other party before an offer can become a contract.

In other words, a mere mental determination to accept an offer, a determination that is indicated to the other party in no way is not such an acceptance as will bind the parties or complete a contract.

7 Amer. and Eng. Ency. Law (2d Ed.) 129, and cases cited.

All the authorities agree upon the above proposition of law, and it was so declared by Lord Blackburn in the House of Lords, who stated that this had been the law for 300 years, or since the case of T. Pasch 2, 17 Edward IV. In which case Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them and would give 2s. 6d. for them, he might take them; that was the justification. * * *.

Brian says:

> "Moreover, your plea is utterly naught, for it does not show that when you made up your mind to take them you signified it to the plaintiff, and you having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is."

Brogden vs. Metropolitan Ry. Co., 2 App. Cas. 666, 692.

In the case of Jenness vs. Mt. Hope Iron Co., 53 Maine 20, it was held:

> "An intention to accept locked up in the breast of a party, and not communicated to the other, is not sufficient to constitute an acceptance."

In the case of White vs. Corlies, 46 N. Y. 467, where the plaintiff, a builder, received from defendants a note to begin certain work at once and finish within two weeks, and without sending any reply the plaintiff immediately purchased lumber for the work and began to prepare it, and next day the order was countermanded, the court held:

> "That inasmuch as there was no acceptance before the countermanding of the order that there was no contract and the mere fact that material had been purchased and work performed did not change the situation."

One of the leading cases, cited by nearly all the text writers, is the case of Trounstine vs. Sellers, 35 Kansas 447.

In this case, the plaintiff sold certain goods to Moore & Weaver, and a dispute arose as to terms of payment; Moore & Weaver wrote to plaintiff, that if the terms named by them were not satisfactory, that they would return the goods.

The plaintiff did not answer the letter, but immediately left on a western trip, intending to go to Ottawa, Kansas, and adjust the matter, but it was thirty days before his arrival and in the meantime a creditor had taken charge of the goods under a chattel mortgage, and the plaintiff replevined the goods, claiming that the act of leaving for Ottawa, Kansas, to accept said goods, was an assent to the agreement to return the same.

The court held:

"That the mere determination to accept an offer, does not constitute an acceptance which is binding.

The assent must be either communicated to the other party or some act must be done which the other party has expressly or impliedly offered to treat as a communication, a mere mental assent is not sufficient."

In this case the court further held:

"That where parties are distant and the contract is made by correspondence, the mere writing of a letter or telegram is not sufficient to complete the contract, it must be placed in the mail, or deposited in the telegraph office for transmission, and thus place it beyond the power and control of the sender."

And this is the law that has been followed without a dissenting opinion by every state that has had occasion to pass upon the point.

In McCormick vs. Richardson, 89 Iowa 535, a party ordered certain twine to be shipped about May 1, with full agreement as to price and terms, but the McCormick Company never notified defendant of the acceptance of the offer, but when the time came shipped the goods, which defendant refused to accept, and the court held:

"That a contract includes a concurrence of intention of two parties, one who promises to do something for the other, who, on his part, ac-

cepts such promise, hence consent or acceptance is indispensable to the validity of every contract.

A mere offer, not assented to, constitutes no contract, for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceeded to it is binding on neither party, and may be retracted."

Citing in support of this decision:

Goodpaster vs. Porter, 11 Iowa 161-163;
2 Kents Com. 477;
1 Parsons Contracts 475;
1 Storey Contracts 490;
Hilliard on Sales, Sec. 20;
Benj. on Sales, p. 73;
Bennett's Ed. 1892 Amer. Notes.

Where in the case at bar is there any showing whatever that the offers of the petitioner were ever accepted, much less any showing that any acceptance was communicated to Mr. Jackson.

Whether the trustee intended to accept the proposals of Mr. Jackson or not cannot be determined, he may have so intended, but it was necessary for him to signify his intention so that he would be bound on his part and so that Mr. Jackson would be in position to enforce that acceptance on his part, and that must be an acceptance such as Mr. Jackson could legally enforce.

The attorney for the respondent claims that the acceptance of Mr. Jackson's money constituted an acceptance and completed the contract, but I hardly

believe that such contention is seriously made, as the question has been decided numerous times, that the acceptance of money on an offer had no effect to change or modify a contract and does not give it any greater validity.

In the case of Smith vs. Weaver, 90 Ills. 392, the defendant wrote the following memorandum upon his book:

> "Sold this day to N. Weaver a bill of lumber to complete a house for himself, at the following prices, provided he wishes to build this fall, or wishes to get the lumber for the house this fall."
>
> (Signed) N. Weaver.

On the above memorandum Weaver paid the sum of $500.

Afterwards he concluded not to build the house and demanded the return of his money, less the amount of lumber he had taken of Smith, and the court held, that the above memorandum was merely an offer until accepted and not a contract for $500 worth of lumber, and the $500 paid by Weaver at his own suggestion had no effect upon the contract and he was entitled to recover his money, as there had been no acceptance of the offer.

There is not one element of a contract in the case at bar, there was no meeting of minds, no mutuality of contract, no consideration, not even a promise for a promise.

Mr. Jackson could enforce nothing as against the trustee, and could not go into any court and assert any rights whatever, the proposals both included real property and under the statutes of Idaho agreements for the sale of real property must be in writing. The statutes of Idaho on this proposition are as follows:

> "Sec. 6009. In the following cases the agreement is invalid unless the same, or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent. Evidence, therefore, of an agreement cannot be received without the writing or secondary evidence of its contents.
>
> * * * * *
>
> 5th. An agreement for the leasing for a longer period of one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Now, how, under these statutes, would it be possible for Mr. Jackson to enforce anything as against the trustee? There was no note or memorandum of any agreement subscribed by the party to be charged, and Mr. Jackson would have been unable to maintain any action against the trustee to enforce a sale.

A contract to be binding must be mutual, that is, so that both parties are bound and so the same can be enforced by both the parties. This has been

so held numerous times by the Supreme Court of the United States and the case of Tilley vs. Cook County, 103 U. S. 155, is very much in point.

We consider it unnecessary to answer those matters set forth in respondent's brief of matters not contained in the record.

There is no showing whatever in the record of the losses incurred as stated on page 13 of respondent's brief, nor is there any showing of bad faith on the part of the petitioner, as there was none, and the attempt to bring these matters before the court must, as of course, fail.

The attorney for the respondent in his brief argues that the trustee did everything that it was possible for him to do to accept this contract, but we deny this statement, for if the trustee had authority to sell at private sale (a fact we do not concede), then he could have accepted this proposition in writing, by noting his acceptance on the offer, or he could have entered into a written contract with Mr. Jackson, selling him this property, and if a sale was intended this should have been so done, and while a sale would have to have the approval of the court, still, if the sale was proper, the court would have approved the sale and Mr. Jackson would have the same right to demand an approval as the trustee and creditors. But in this case Mr. Jackson could not demand any rights whatever as no sale is shown or was ever made, and as to the meeting of minds, the

record fails absolutely to bear out the respondent's claims in that respect.

In regard to the authorities cited by respondent, a causal examination of the same will show that none are in point.

In re J. Jungman, 186 Fed. 320, is based upon an entirely different proposition, as the court held that the offer made by Hegeman & Co. had BEEN ACCEPTED WITHIN THE 3 DAY LIMIT STATED IN THE OFFER, AND THAT AFTERWARDS THE SALE WAS CONFIRMED WITH THE ASSENT OF THE PARTY MAKING THE PROPOSAL.

Of course, after a proposal is accepted, then the court has full authority to proceed to enforce its terms.

Besides, they held in this case, that the attorney for the purchaser was in court agreeing to the confirmation.

The case of Mason vs. Wolkowich, 150 Fed. 699, is not in point, but is a case of ratification, where the trustee actually sold property at a less price than authorized by the court, and then petitioned the court to affirm the sale, which the court did, and it was afterwards held that the filing of the petition was an affirmation by the trustee of the sale, but it was not held that the same was an acceptance of the bid, as is attempted in this case.

These cases then have no application to the case at bar.

Replying to the reasons given by respondent why the judgment should be affirmed, as to

First. We deny that the minds of the parties ever met as stated.

Second. There was no breach on the part of Jackson as no contract had ever been made.

Third. There was no sale to confirm, none had been made, and the proposals to purchase had been withdrawn, and the statement that property had to be sacrificed to meet payments to the Northern Trust Company, is childish, as this company being in bankruptcy, no creditor could force a sale without the permission of the court, so that all statements as regarding a forced sale have no bearing.

Fourth. There is nothing in the record showing any sacrifice whatever.

Fifth. There is nothing in the record showing bad faith on the part of Mr. Jackson and we contend it is unfair to make statements of this kind which have nothing to support them.

Sixth. We deny it would be a dangerous precedent to insist that all dealing with a trustee should be upon a business basis and in conformity to law, so that both parties to a transaction can be fully protected by the courts, as prospective purchasers of bankrupt estates must surely be given equal rights with a trustee, and it should not be more hazardous to deal with a trustee than with an individual, and it would truly be very dangerous and make the admin-

istration of estates more difficult if it is held that an offer to a trustee, unaccepted, cannot be withdrawn.

We again respectfully request that the decree of the Honorable District Judge be reversed, and a decree entered, affirming the order of the referee and requiring the trustee to refund to your petitioner, Duval Jackson, the sum of two thousand ($2,000) dollars with interest.

Respectfully submitted,

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CLAY H. ALEXANDER,
Attorney for Petitioner,
Kansas City, Missouri.

Service of the within reply brief of petitioner Duval Jackson, on review, is hereby accepted, by the receipt of a copy thereof, this.....day of April, A. D. 1913.

....,
Attorney for Trustee,
Coeur d'Alene, Idaho.